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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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CHARLES ELMORE CROPLEY
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No. 343

STATE OF NEW YORK, STATE OF DELAWARE, STATE OF INDIANA, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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Section 15(1) 2
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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil No. 2311

THE STATES OF NEW YORK, DELAWARE, INDIANA, MARYLAND, MICHIGAN, NEW JERSEY, OHIO, WISCONSIN, AND THE COMMONWEALTH OF PENNSYLVANIA,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Civil No. 2337

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JURISDICTIONAL STATEMENT

Pursuant to Rule 12 of the revised rules of the Supreme Court of the United States, the plaintiff appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above entitled cause sought to be reviewed.

A. Jurisdiction

The statutory provisions believed to sustain the jurisdiction of the Supreme Court to review by direct appeal the final decree entered in these causes by the Court below are contained in U. S. C., Title 28, Section 47a, which provides:

> "A final judgment or decree of the District Court in the cases specified in Section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." (36 Stat. 1150; 38 Stat. 220.)

These causes being actions "to enjoin, set aside, annul, or suspend in whole or in part" orders of The Interstate Commerce Commission are cases "specified in Section 44 of this title."

The following decisions sustain the jurisdiction of the Supreme Court to review the final decree and order on direct appeal in these causes:

Ann Arbor R. Co. v. *United States*, 281 U. S. 658;
Texas & Pacific Ry. Co. v. *United States*, 289 U. S. 627;
United States v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499;
Atchison, T. & S. F. Ry. Co. v. *United States*, 284 U. S. 248.

B. The Statutes of the United States which are involved

The validity of a statute of a state, or of a treaty of the United States, is not involved.

The statutory provisions involved are Section 1(4) and (5)(a), Section 3(1) and Section 15(1) of the Interstate Commerce Act (U. S. C., Title 49) and Section 5(b) of the

Transportation Act, 1940 (U. S. C., Title 49, footnote following Section 3(5) in 1945 supplement, 54 Stat. 902), commonly referred to as the Ramspeck Resolution.

C. Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented.

The decree sought to be reviewed was entered on May 27, 1946. The petition for appeal was presented and allowed on June 25, 1946, together with the assignment of errors.

D. Nature of the Case and of the Rulings of the District Court.

These are two suits, brought in the United States District Court for the Northern District of New York, under the provisions of U. S. Code, Title 28, Sections 41 and 43 to 48, inclusive, seeking a review of and a final decree setting aside, annulling and enjoining orders of the Interstate Commerce Commission in proceedings before it entitled *Class Rate Investigation, 1939*, Docket No. 28300, and *Consolidated Freight Classification*, Docket No. 28310. These proceedings were conducted upon a single record as one investigation, commonly referred to as the Class Rate Investigation. The Commission's original report is printed in 202 I. C. C. 447. A supplemental report made by the Commission has not yet been printed. The orders sought to be enjoined were a so-called interim order, dated May 15, 1945, as amended with respect to its effective date by several subsequent orders, and a supplemental order dated October 30, 1945, which for brevity are jointly referred to herein as the Commission's orders.

In the course of the development of railroad systems and railroad transportation, the country, for the purposes of railroad freight rates, has come to be divided into sections

referred to as rate or classification "territories." The boundaries of these territories conform generally but with some exceptions with the termini of the railroad systems so that each territory embraces railroads which are chiefly competitive each with the other and are affected by common, physical, business, and other conditions. Official or Official Classification Territory, so-called, is roughly that portion of the United States north of the Ohio and Potomac Rivers and east of the western shore of Lake Michigan, extending diagonally to the western bank of the Mississippi River opposite Illinois. It embraces the plaintiff states and New England. The Southern or Southern Classification Territory is that section of the country, roughly, south of the Ohio and Potomac Rivers and east of the Mississippi River. Western or Western Classification Territory includes the part of the country west of the Mississippi River and also part of Wisconsin.

Corresponding with the foregoing divisions of the country, the railroads publish and maintain in tariff schedules filed with the Commission three major classifications of freight, known respectively as the Official, Southern and Western Classifications. In these classifications many thousands of articles of freight are listed and are assigned to classes—for example, first class, second class, etc.—for the purpose of determining the freight rates to be charged for transportation by railroad. Then by other tariff schedules filed with the Commission the several railroads publish and maintain freight rates to be charged for the transportation of freight of each of the several classes between various points. These rates are known as the class rates. The classifications or classes to which many of the articles are assigned are not uniform in the several classifications. For example, an article may be classified third class in the Official, fourth class in the Southern, and fifth class in the Western Classifications.

In addition to the classifications and class rates, the railroads in the several sections or rate territories have from time to time published and now maintain tariff schedules providing numerous exceptions to the classifications. They also have filed and published a large number of tariff schedules naming rates for the transportation of individual commodities between specified points, which rates are commonly referred to as "commodity rates." As a general rule these exceptions and commodity rates are lower than and supersede the class rates so that the classifications and class rates determine the charges for transportation only as to freight for which no exception or commodity rates are in effect.

Due to various factors, such as the characteristics and volumes of freight to be transported, the varying competitive conditions encountered and the influences and orders of different governmental authorities, the railroads in the several classification and class rate territories—Official, Southern and Western—have followed different theories and practices in establishing and maintaining their various rates. In Official Territory the transportation of a larger proportion of the total freight moving by railroad is made subject to class rates, as distinguished from exception and commodity rates, than is the case in Southern and Western territories. The class rates are charged principally for the transportation of manufactured articles. Many commodity rates, for the transportation of low-grade freight and raw materials, are higher mile for mile in Official Territory than the corresponding rates in Southern and Western territories. For the transportation of many articles for which the railroads in Official Territory charge class rates, the railroads in the South and West charge exception rates or commodity rates which are lower than the class rates in those territories and in some instances

are as low as or lower than the class rates charged in Official Territory for the same distances.

The Commission's order with which this action is concerned related only to the class rates.

The present class rates for transportation in each territory and from one territory to another were prescribed by the Commission not long ago after extensive investigations. In these investigations, because of and on the basis of findings of great differences in the kinds and volumes of freight in the several territories, in the physical and competitive conditions encountered by the railroads, in the rate schemes of the railroads and in other factors, the Commission prescribed quite different class rate scales for the several territories, different in level and in rate of progression with distance. The class rates for transportation between points in Official Territory were set at a level somewhat lower than the levels determined for the class rate in the South and West. *Eastern Class Rate Investigation* (1930), 164 I. C. C. 314; 171 I. C. C. 481; 177 I. C. C. 156; 203 I. C. C. 357; *Southern Class Rate Investigation* (1925), 100 I. C. C. 513; 109 I. C. C. 300; 113 I. C. C. 200; 128 I. C. C. 567; *Western Trunk Line Class Rates* (1930), 164 I. C. C. 1 and several supplemental reports of which the sixth (1934), 204 I. C. C. 595 contains the principal bases for the present rates; *Consolidated Southwestern Cases* (1927), 123 I. C. C. 203 and several supplemental reports of which the twenty-first (1934), 205 I. C. C. 601 contains the principal bases for the present rates; *Western-Southern Class Rates* (1938), 226 I. C. C. 497; 231 I. C. C. 315; 232 I. C. C. 81; 238 I. C. C. 681 and 246 I. C. C. 119 (1941).

Notwithstanding these facts, the Commission in its report here in issue has concluded that the class rates for transportation in each territory and from Southern and Western territories to Official Territory are unlawful under the

Interstate Commerce Act because they are not uniform and to the extent that each is higher or lower than the other. Based upon such a conclusion and as a temporary measure pending the working out of a completely revised basis of class rates the Commission has made the interim order involved in this action. By this order, for the purpose of bringing about, as nearly as may be, a uniform level of class rates, the Commission would require the railroads in Official Territory to increase by ten percent their class rates for transportation within that Territory and would require a ten percent reduction in the class rates for transportation in the South and West and from those territories to Official Territory.

Civil No. 2311 was brought by nine Northern States located in Official Classification Territory, the States suing in their own capacity as shippers and receivers of freight and also in their representative capacities on behalf of their communities, citizens and industries, who would be subjected by the Commission's order to the ten percent increase in the class rates for railroad transportation within Official Territory. Because of the large volume of freight on which class rates are charged in Official Territory, the Commission's findings and the evidence indicate that the increases in freight charges resulting from the Commission's order would amount to many millions of dollars annually.

Civil No. 2337 was brought by the Western railroads and attacked particularly so much of the Commission's order as would require a ten percent reduction in the class rates charged by those railroads.

The Governors of the New England States intervened in both actions. The Western railroads intervened as intervening plaintiffs in No. 2311 and the States of New York and Ohio intervened as intervening plaintiffs in No. 2337.

The Commission appears to have been led to its ultimate

conclusion upon which its interim order was based by a belief that the so-called Ramspeck Resolution together with an amendment made to Section 3 of the Interstate Commerce Act by the Transportation Act of 1940 accomplished a change in the substantive requirements of the law and that the Commission was thereby under a mandate or at least authorized to bring about a uniform basis of class rates throughout the country, to find the existing class rates unlawful because not uniform and to order both increases and reductions to accomplish uniformity without findings on proof of the preliminary facts which have heretofore been held to be essential as the basis of ultimate findings that rates are in violation of Sections 1 and 3 of the Interstate Commerce Act.

Thus the Commission's order, in supposed exercise of its power to prescribe minimum reasonable rates, would require a ten percent increase in the class rates for transportation between points in Official Territory, notwithstanding that there is no finding and no evidence to support a finding that the existing class rates are not fully compensatory to the railroads for the transportation for which they are charged, or a finding that the maintenance of the present class rates threatens a rate war or is otherwise likely to jeopardize the financial ability of the railroads to provide adequate and efficient transportation service. The question is presented whether the Commission may require rates raised under such circumstances and in the face of evidence, reflected also in findings in its report, that the existing class rates are highly profitable to the railroads in Official Territory. It has never heretofore been held that the Commission may order an increase in freight rates under these circumstances.

One of the principal questions for determination in the action is whether under the law as it now is and in the

light of the changes made by the Transportation Act of 1940, the Commission has the power and is under a duty to require shippers and receivers of freight in Official Territory to pay increased freight charges to the carriers by whom they ship in order that uniformity of class rates may be accomplished at a level which will not bankrupt the railroads in other sections of the country.

Again the action presents a question whether, in the guise of accomplishing a uniform level of class rates, the Commission may require an increase in the class rates for transportation in Official territory and may find that undue prejudice and preference in violation of Section 3(1) of the Interstate Commerce Act exists by reason of the differences in the levels of the published class rates, in the absence of findings and of evidence to support findings that the freight for the transportation of which class rates are charged in Official Territory is likewise subject to class rates for transportation within and from the other territories, in the absence of any finding or evidence to support a finding that the differences in the levels of the class rates have been the cause of any substantial injury to Southern and Western territories or to shippers or industries therein, and in the face of findings and evidence that whereas the class rates to be increased for transportation within Official Territory are charged upon a very large volume of freight transported within that Territory, only a negligible proportion of freight is charged class rates in the other territories because the railroads have there established exception or commodity rates lower than the class rates.

The case presents the very important and far-reaching question whether notwithstanding the wide variations in kinds and volumes of freight transported in the different territories, the different physical and other transportation conditions encountered by the carriers therein, the

different schemes of rates evolved and maintained by the carriers in the different territories, in the face of the fact that for the most part the carriers serving one territory do not operate in another territory, and in the face of the Commission's own decisions in the past that these considerations required that the freight rates should be at different levels in the different sections of the country, the class rates are now unlawful because not on a uniform level throughout the entire country east of the Rocky Mountains.

Without here detailing all of the other matters involved, these actions further present the question whether the Court should not take judicial notice of the profound economic changes wrought by the war now confronting the nation in the postwar period, as it took judicial notice of the consequences of the depression of the '30s, *Atchison T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, and whether in the light thereof it should not conclude, as it did in the case cited, that because the Commission's order is based upon evidence relating to conditions in 1939 and the early war years, this order which would take effect in the postwar period is now invalid because not based upon competent proof as to the conditions in which it is to operate.

The statutory district court denied a permanent injunction of the Commissioner's order. The court appears to have rested its decision primarily upon a holding that the amendment made to Section 3(1) of the Interstate Commerce Act by the Transportation Act, 1940 so changed the law that the Commission in the accomplishment of a uniform level of freight rates was justified in finding the existing rates previously prescribed by it unlawful without findings of preliminary facts heretofore considered essential to such an ultimate conclusion. However, the district court has certified reasonable doubt as to its decision in this regard.

E. The substantial character of the issues

The impact of the Commission's decision and order would fall principally upon the States, communities, industries and individuals embraced within Official Territory. The mere fact that a ten percent increase is proposed in the freight rates charged upon a substantial proportion of the total freight traffic transported throughout the northern quarter of the country should alone call for full judicial review, lest the citizens of that section be subjected to additional freight costs amounting to many millions of dollars annually as the result of an erroneous interpretation of the law or without adequate justification in the evidence for overturning a rate adjustment upon which the business of the country has developed.

But it is not only the magnitude of the territorial reach of the Commission's order or the amount of the additional transportation costs which it would impose upon shippers and receivers of freight in the appellant States which affords basis for the appeal to the Supreme Court. The fact that these results proceed from or are based upon an interpretation of an amendment to the Interstate Commerce Act not heretofore judicially construed and whose construction will affect railroad rate regulation in the future adds to the importance of the issues. In addition to this is the significant feature that the Commission's decision and order resting upon its interpretation represent a departure from or reversal of previously established tenets as to what must be proved and found to sustain an ultimate conclusion that freight rates violate the Interstate Commerce Act and what is necessary to justify the exercise by the Commission of its power to order freight rates increased. These considerations certainly afford strong reason for scrutiny by the highest court of the lower court's decision upholding the action of the Commission.

The Commission knew that it was departing from previously recognized paths in the interpretation and administration of the Interstate Commerce Act, as is indicated by its attempt to find justification of its action in the supposed change in the law accomplished by the amendment to Section 3 of the Act. That there was doubt as to the soundness of the decision of the majority of the Commission both as to the interpretation of the law and as to the sufficiency of the evidence to sustain the order is shown by the vigorous dissents of some of the members of the Commission. The decision of the District Court upholding the order of the Commission, which represents a departure both from previous rate-making practices and standards and from long accepted interpretation of the Interstate Commerce Act, which rests upon legislative enactment not heretofore construed by the Supreme Court but whose effect will be felt in all future rate litigation, and which would impose an added freight burden of many millions of dollars upon the communities, shippers and industries of a large section of the country, is certainly of such importance as to be worthy of review by the Supreme Court.

And if there were need for further confirmation that this is a case especially calling for review by the Supreme Court, it is found in the final decree signed by the three judges of the district court, where after having pondered the record, the authorities and the original arguments of the parties in the preparation of its decision and then having heard the parties in all-day argument upon motions to continue and to dissolve the interlocutory injunction, the court certified:

> "The decision of these consolidated cases necessarily involves the determination of novel questions of law of great importance to the shippers, the carriers and the public of this country. There are reasonable

and serious doubts as to the determination of these novel and important questions."

Toward the conclusion of the argument upon the continuance of the interlocutory injunction, Circuit Judge Chase, the presiding judge of the three-judge court, said:

"While we used our best endeavors to decide this case promptly I still am and always have had serious doubt as to whether we properly construed that Section 3 of 1940, whether we have given it the right scope, and if we have, I should have serious doubt as to whether the findings made by the Commission were adequate to support their conclusions as to prejudice and discrimination." (Minutes of Hearing, May 28, 1946, p. 73)

Shortly before that Judge Knox had said:

"I think from our study of the law the order may not be sound * * *." (Minutes, p. 69)

With doubt thus expressed by the court below as to the crroectness of its decision and as to the validity of the Commission's order, and with members of the Commission having challenged the action of their associates in issuing the order, it is submitted that there can be no question but what the Supreme Court should hear this appeal.

F. Opinion, decree and order of the District Court

Appended to this Statement are: (1) Copy of the opinion of the District Court, dated May 9, 1946; (2) the interlocutory injunction dated December 20, 1945, restraining the enforcement of the Commission's order pending determination of the petitions for a permanent injunction; and (3) final decree and order of the District Court dated May 24, 1946, dismissing the petitions in the above entitled causes and continuing the interlocutory injunction in effect, pending the taking of an appeal and the determination thereof by the United States Supreme Court.

Prayer for Reversal

WHEREFORE appellants pray that their appeal may be heard and that the judgment, decree and order of the District Court may be reversed.

Respectfully submitted,

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APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

Civil No. 2311

THE STATES OF NEW YORK, DELAWARE, INDIANA, MARYLAND, Michigan, New Jersey, Ohio, Wisconsin and The Commonwealth of Pennsylvania, *Plaintiffs,*

against

THE UNITED STATES OF AMERICA, *Defendant*

Civil No. 2337

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., et al., *Plaintiffs,*

against

THE UNITED STATES OF AMERICA, *Defendant*

Before Chase, Circuit Judge, Knox and Brennan, District Judges

Two suits brought pursuant to 28 U. S. C. A. Pars. 41 (28) and 43-48 inclusive and also under the general jurisdiction of the court in equity to enjoin, annul, set aside and suspend orders of the Interstate Commerce Commission, Petitions dismissed.

Parker McCollester, New York City; Frank J. Clark, New York City, Special Assistant Attorneys General, for the State of New York.

Herbert T. Ferguson, Madison, Wisconsin, Assistant Attorney General for the State of Wisconsin.

Kenneth L. Sater, Columbus, Ohio for the State of Ohio.

Robert Peacock, for the State of New Jersey, Deputy Attorney General.

Henry E. Foley, Boston, Mass., for New England Governors.

Vincent G. Hart, New York City in behalf of Department of Law of the State of New York.

H. C. Barron, Chicago, Ill., for Western Railroads.

Edward H. Miller, Special Assistant to the Attorney General, Washington, D. C., for The United States of America.

Daniel W. Knowlton, Chief Counsel to the U. S. Interstate Commerce Commission, Washington, D. C., for Interstate Commerce Commission.

George T. Simpson, St. Paul, Minn. for J. A. A. Burnquist, Attorney General, and the State of Minnesota.

J. V. Norman, Louisville, Kentucky, for the Southern States and Southern Governors' Conference.

Byron M. Gray, Topeka, Kansas, for States of North Dakota, South Dakota, Kansas, Nebraska, Oklahoma, Texas and Arkansas, and their respective State Commissions.

C. E. Logwood, Public Service Commission of South Carolina, Columbia, South Carolina, for Public Service Commission.

Robert F. Park, Montgomery, Alabama, for Alabama Public Service Commission.

Douglas F. Smith, Chicago, Ill., for Western Railroads.

Lewis Petteway, Tallahassee, Florida, for Florida Railroad Commission.

Karl J. Stipher, Deputy Attorney General of Indiana, Indianapolis, Indiana.

Hugh S. Jenkins, Columbus, Ohio, for State of Ohio.

J. C. Murray, Little Rock, Arkansas, for State of Arkansas, the Governor of Arkansas and the Arkansas Public Service Commission.

Neal E. Williams, Fargo, North Dakota, Solicitor for Nels G. Johnson, Attorney General of North Dakota, and Public Service Commission, State of North Dakota.

H. Emerson Kokjer, Deputy Attorney General of Nebraska, Lincoln, Nebraska, Solicitor for State of Nebraska and Nebraska State Railway Commission.

Duane T. Swanson, State Capitol Bldg., Lincoln, Nebraska, for State Railway Commission.

C. B. Bee, Oklahoma City 5, Oklahoma, for Governor Robert S. Kerr; State of Oklahoma, Corporation Commission, and Western and Southwestern States.

Walter R. McDonald, Georgia Public Service Commission, Atlanta, Georgia, for Southeastern Association of R. R. and Utilities Commissioners.

Jerry W. Carter, Tallahassee, Florida, for Florida Railroad Commission.

David O. Mathews, Special Assistant to the Attorney General of the United States, of Counsel for the United States.

D. Robert Thomas, Chicago, Ill., for Western Railroads.
James Noel, Assistant Attorney General, Austin, Texas, for State of Texas and Railroad Commission of Texas.

STATEMENT AND FINDINGS OF FACT BY THE COURT

These two suits put in issue the validity of the same orders of the Interstate Commerce Commission and were consolidated for hearing before a court of three judges constituted in accordance with provisions of the Urgent Deficiencies Act, 38 Stat. 29.

The first was brought against the United States by the States of New York, Delaware, Indiana, Maryland, Michigan, New Jersey, Ohio, Wisconsin and The Commonwealth of Pennsylvania to enjoin, set aside, annul and suspend orders of the Interstate Commerce Commission requiring an increase of ten per cent in what are called the class rates charged by the railroads for transporting freight in the so-called Official Territory and a decrease of ten per cent in the class rates charged by railroads for transporting freight in the so-called Southern Territory, Western Trunk Line Territory and Southwestern Territory and corresponding changes in the interterritorial rates. Parties in interest were permitted to intervene [1] and, after hearing, an injunction pendent lite was granted.

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[1] Horace A. Hildreth, Governor of Maine; Charles M. Dale, Governor of New Hampshire; Mortimer R. Proctor, Governor of Vermont; Maurice J. Tobin, Governor of Massachusetts; John A. Pastore, Governor of Rhode Island; Raymond E. Baldwin, Governor of Connecticut, (Referred to as the New England Governors), Intervening Plaintiffs. The Atchison, Topeka and Santa Fe Railway Company; Beaver, Meade and Englewood Railroad Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago and North Western Railway Company; The Chicago, Rock Island and Pacific Railway Company; and Joseph B. Fleming and Aaron Colnon, Trustees of The Chicago, Rock Island and Pacific Railway Company, Combined; Chicago, Saint Paul,

Footnote continued on page 18

Footnote 1 continued from page 17

Minneapolis and Omaha Railway Company; The Colorado and Southern Railway Company; The Denver and Rio Grande Western Railroad Company; The Duluth, South Shore and Atlantic Railway Company; Elgin, Joliet & Eastern Railway Company; Fort Dodge, Des Moines & Southern Railway Company; Fort Worth and Denver City Railway Company; Great Northern Railway Company; Green Bay and Western Railroad Company; Gulf, Colorado and Santa Fe Railway Company; The Kansas City Southern Railway Company; Midland Valley Railroad Company; The Minneapolis & St. Louis Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; Missouri and Arkansas Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas; Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor; Northern Pacific Railway Company; Panhandle and Santa Fe Railway Company; St. Louis Southwestern Railway Company; Southern Pacific Company; Texas and New Orleans Railroad Company; Union Pacific Railroad Company; The Texas and Pacific Railway Company; The Wichita Valley Railway Company, Intervening Plaintiffs. The United States, Defendants. The Interstate Commerce Commission; The Southern States; Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and The Southern Governors' Conference, a voluntary organization of the Governors of the Southern States; The States of Arkansas, Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas, and their respective State Commissions; The Arkansas Public Service Commission, The State Corporation Commission of Kansas, The Kansas Industrial Development Commission, The Nebraska State Railway Commission, The Public Service Commission of the State of North Dakota, The Corporation Commission of the State of Oklahoma, The Public Utilities Commission of the State of South Dakota, and The Railroad Commission of the State of Texas; The State of Minnesota; and The Southeastern Association of the Railroad and Utilities Commissioners, Intervening Defendants.

Thereafter the Atchison, Topeka and Santa Fe Railway Company and others which will be referred to as the Western Lines,[2] brought another petition against the United States in which the same relief was sought in respect to the same orders. Interested parties were allowed to intervene.[3]

These two suits were heard as a consolidated action, all questions relating to venue having been waived.

In order to understand the issues here presented, as well as the action of the Commission and the relevancy of the facts found by it, some preliminary statement of what was in 1939 apparently the prevailing situation in this country in respect to freight classifications and freight rates is necessary.

For the purpose of fixing freight rates the country was, and now is, divided into the four territories already mentioned and one other which is called Mountain-Pacific Territory, and which is not involved in these suits. It covers the States of Montana, New Mexico, the western portions of Colorado and Wyoming, and all the States west of them. The other territories, which are all involved in these suits, may be roughly described as follows: Western Trunk Line Territory includes the States east of Mountain-Pacific Territory, north of Oklahoma and Arkansas, and west of the Mississippi River and the greater part of Wisconsin and the northwestern portion of Michigan. Southwestern Territory includes the country south of Western Trunk Line Territory and west of the Mississippi River. Southern Territory consists of the country lying east of the Mississippi and south of the Ohio and Potomac rivers. Official Territory comprises the remainder of the country lying

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[2] The plaintiffs were the Western Railroads, supra footnote 1.

[3] The States of New York and Ohio; The New England Governors (listed above), Plaintiff Intervenors. The Interstate Commerce Commission; The Southern States, and The Southern Governors' Conference (listed above); The Western States and their respective Commissions; The Southeastern Association of Railroad and Utilities Commissioners, Defendant Intervenors.

north of the Ohio and Potomac rivers and east of the western boundary of Lake Michigan and a line drawn diagonally therefrom to the western bank of the Mississippi River opposite Illinois. Official Territory has two subdivisions one of which includes all of New England and the other of which, known as Zone C, takes in the northern part of Michigan and a small part of Wisconsin. In the Southern Territory the greater part of Florida is a subdivision and in Western Trunk Line Territory there are Zones I, II, III, and IV. In each of these subdivisions rate differentials are applicable which vary the class rates from those in force elsewhere in the territories.

There are different freight rates in all the territories and these are known as class rates, exceptions to class rates, column rates and commodity rates. Only the class rates are involved in these suits. They are rates based on published classifications which are lists of commodities by name grouped in designated classes. To compute a freight charge under class rates it is necessary to know the classification, the rate for that classification and then take into account factors like weight of the shipment and distance to be carried. The basic rate so fixed for Class I is applicable percentagewise to the other classes, the rates for them being higher or lower than for Class I as the case may be. Commodity rates are special rates which have been fixed for designated commodities transported between specified points regardless of the class rates; column rates are special rates for certain named commodities which are based upon a given percentage of the class rates; and exception rates are, as their name implies, variations from the class rates. There are also key rates which apply to certain so-called key points. These differing rates, of which all but the class rates will hereafter be called for convenience special rates, have come into being because of various considerations among which have been competition between the railroads themselves, between railroads and carriers by water and by motor truck, orders issued by the Interstate Commerce Commission, which will hereafter be called the Commission, composition and amount of traffic available for carriage, cost of operation and other like

relevant factors. The result is more or less of a hodge podge at least so far as class rates are concerned and various efforts have been made to secure greater uniformity and simplicity in rate making ever since the Commission was created. Despite the efforts of the Commission and the cooperation of the railroads these efforts have heretofore been mainly fruitful only in respect to improving conditions in regard to intraterritorial rates.

Not only have the class rates varied among the territories but the classifications published for the several territories have been so different that like articles were, and are, often classified in one class in one territory and in a different class in the others or in one of them. All this has brought about a most complex system of class rate fixing which has, generally speaking, produced lower class rates for Official Territory than for the others though that appears not to hold true in respect to special rates. Another result has been that a greater proportion of all freight in Official Territory moves on class rates than in the others where exception, column and commodity rates have become more prevalent, though it has come about that in all the territories only a comparatively small percentage of the entire freight carried has been on class rates. What is so carried moves both in carload, and in less-than-carload, lots and the cost of its transportation varies accordingly throughout the territories and also varies somewhat because of dissimilar conditions affecting cost of operation.

Although the products of farm, mine and forest are by no means negligible within Official Territory, that portion of the country does in some respects stand apart from the remainder because it is there that the greatest concentration of industrial plants, population, and buying power is found. The larger and better markets which producers in general wish to reach are found there and the prevailing lack of uniformity in classifications and in class rates, in so far as they directly bear upon the cost of transportation by freight within Official Territory and interterritorially between it and the other territories, and indirectly through the special rates, was thought by many to be on the whole more favorable to Official Territory, and to shippers and

receivers of freight therein, than to the other territories and their shippers and receivers of freight.

It was against this general background that the Commission determined to institute two investigations and on July 29, 1939, issued orders which, as later modified, resulted in prolonged hearings by Division 2 of the Commission upon due notice to all parties in interest, as to the lawfulness of the classifications and of the class rates in each of the territories now involved. These investigations known as Docket No. 28300 which dealt with the rates and Docket No. 28310 which dealt with the classifications were so related that they were conducted simultaneously. The cooperation of the state commissions was sought in accordance with Par. 13 of the Interstate Commerce Act (49 U. S. C. A. Par. 13), and a committee representing such commisssions sat with the Division. The investigation became extremely comprehensive and a large amount of evidence was received which was reviewed by the full Commission. It filed a proposed report in No. 28310 providing for the creation of a uniform classification for all the territories including that part which is now subject to what is called the Illinois classification which has some interstate application in a border area between Official Territory and Western Territory but has no interterritorial effect, to be compiled by the Commission or by the railroads for the approval of the Commission provided the railroads were willing to undertake the task. The railroads indicated their willingness to do so and the classification is now being made. That will require an enormous amount of work and will take a considerable time, perhaps years. No issues respecting that classification which is dealt with in Part I of the Report are raised now.

Without serving a proposed report in No. 28300, the Commission filed a comprehensive report dealing with class rates to become effective when the classification is prepared and approved. This report contained numerous findings as to the characteristics of the existing rate structures, the importance of interterritorial traffic, the relative levels of class rates in each territory and the indirect results of the proposed revision. Evidence afforded by intricate and de-

tailed cost studies made by employees of the Commission to show the relative cost of the carriage of freight in the several territories was also received and considered following revisions of the studies made in response to criticisms by interested parties. Findings were made as to interterritorial class rates, the relative levels of revenue from all freight in the Southern and Official Territories, the effect of applying the Official Territory level of all freight rates to all freight moved in Southern Territory, the relative costs and composition of all freight moved in Southern Territory, and the rates of return. The Commission also made findings as to the effect of the class rates on shippers in Southern Territory, the relative costs and composition of the traffic, the rates of return and their effect on the economic development of that territory. Findings on similar or kindred subjects were made respecting the other territories and the interterritorial freight movement among them. The costs of carload and less-than-carload service were considered and findings made as to each. Findings were made as to the effect of motor truck and water-borne freight competition, as to the effect of the special rates on movement of freight taking class rates, and of the discrepancies in the existing class rates on the attainment of uniformity in classification. There is an area geographically within Official Territory which is served by the so-called Pocahontas lines, which are predominantly coal carrying roads, that is for statistical purposes at times treated separately from the remainder of Official Territory because, though those railroads do carry freight at class rates, the bulk of their freight, being coal, is quite different in respect to the means and cost of carriage from the kinds of freight which characterize the carriage elsewhere in the territory. For like reasons Kentucky in the Southern territory was at times likewise treated separately from the remainder of Southern territory in the Report.

The Commission then found as follows:

> "1. That the intraterritorial class rates (except as they apply to rail-and-water coastal service or relate to short or weak-line arbitraries) applicable within

official, Illinois, southern, southwestern, and western trunk-line territories, are, and for the future will be, unjust and unreasonable, in violation of section 1 (4) and (5) of the act.

"2. That the interterritorial class rates in issue in this proceeding applicable between official, Illinois, southern, southwestern, and western trunk-line territories are, and for the future will be, unjust and unreasonable, in violation of section 1 (4) and (5) (a) of the act.

3. That the relation between the interterritorial class rates applicable from southern, southwestern, and western trunk-line territories to official and Illinois territories, on the one hand, and the intraterritorial class rates applicable within official and Illinois territories, on the other hand, makes, gives, or causes, and for the futre will make, give, or cause undue and unreasonable preference and advantage to official and Illinois territories as a whole and the shippers and receivers of freight located therein, and subjects and for the future will subject, southwestern, and western trunk-line territories as a whole and the shippers and receivers of freight located therein to undue and unreasonable prejudice and disadvantage, in violation of section 3 (1) of the act.

"4 That a just and reasonable basis of class rates, not unjustly discriminatory or unduly preferential or prejudical, to be observed by the respondents with respect to the traffic described in findings 1, 2, and 3 immediately preceding, will be the following:

(a) The application as a maximum for class 1 (class 100) of the scale of rates shown in appendix 10.

(b) The rates herein prescribed are to applied to the distances over the shortest possible rail routes by which carload traffic can be interchanged between carriers without transfer of lading.

(c) That the scales of class rates for each class, other than class 1 (class 100), shall bear the percentage

relations, to class 1 (class 100) rates found in part I hereof to be just, fair, and reasonable for the classes in the uniform classification. Appendix M to *Western Trunk Line Class Rates,* 164 I. C. C. 1282 contains a table which shows the percentages of class 100, below 100, herein found reasonable; and shows the rates which will result from applying these percentages to any given rate from 30 cents to $4. The rates shown in this table should be applied in establishing the rates for classes below 100. For classes above 100, fractions of a cent should be disposed of by dropping those less than one-half and by increasing these of one-half cent or more to the next whole cent.

(d) Key-point class rates based on the scale herein found reasonable may be established subject to our approval between points where such rates were prescribed by us in the prior general class rate revisions.

(e) That such class rates shall apply to the ratings of commodities taking class rates as the same shall be rated in the uniform classification found to be just, fair, and reasonable in part I hereof.

(f) That such revised uniform class rates and classification ratings shall be made applicable simultaneously."

No order putting the class rates found to be just and reasonable for the future has been, or will be, made until the new classification becomes effective and no issue is now directly raised as to such rates with which the Commission dealt, but not unanimously in Part II of its Report.

What the Commission, also not unanimously did which is now attacked was to provide in Part III of its Report for an ad interim class rate revision which with certain designated minima class I rates provides in general for a 10 per cent increase in class rates in Official Territory and for a 10 percent decrease in such rates in the other territories involved herein with corresponding changes in interterritorial class rates as already mentioned. The Commission said in part:

"In parts I and II of this report we have found the classification ratings and class rates involved in

this proceeding to be an unjust and unreasonable, and unduly and unreasonably preferential and advantageous, as well as unduly and unreasonably prejudicial and disadvantageous in certain respects for the reasons therein stated. It is our duty under Section 15 (1) of the act to determine and prescribe what will be the just and reasonable rates and charges, and what classification will be just, fair, and reasonable, to be hereafter followed.

"The record herein is extensive, but from the very nature of these proceedings the comprehensive basis of just and reasonable rates cannot at this time be established in connection with a uniform classification such as we have found to be required as just, fair and reasonable, until that classification is brought into being. The comprehensive rate revision and classification, unification and revision should be accomplished simultaneously, if possible. From our prior experience with extensive rate readjustments and classification proceedings, and from the record in this proceeding, we know that necessarily considerable time must elapse before the respondents can formulate and tender for our approval a classification which will conform to our findings with respect to justness, fairness, and reasonableness. The many complexities inherent in a task of such character and magnitude are inevitable. The shipping public and rate-making authorities of the States should be afforded opportunity for participation in the undertaking as far as their interests are concerned. And as shown by the record, and as within our common knowledge, there is at the present time a shortage of men who may be devoted to such task by the respondent carriers, public authorities, including this Commission, and by shippers and their organizations. This latter condition is a direct consequence of the withdrawal of such experts from their former employment for active participation in the war.

"We find, however, that in the circumstances it is possible and practicable to make certain readjustments in the existing basis of class rates, predicated upon

the continued application of the existing classifications, which will be just and reasonable, which will have the effect of bringing to the minimum the preferences and prejudices which we have found to be unlawful, as completely as it is practicable now to eliminate such violations. This finding is based upon the peculiar circumstances of the present time, largely the result of the war, and because time will be needed to effectuate a classification revision and application of a scale or scales of class rates as our findings in part I and part II hereof contemplate. The adoption of the simple and direct method of rate revision which we are about to outline will conserve time, and will obviate many tariff publishing difficulties without complete revision of the classifications before us and the determination and prescription of new scales of rates based thereon.

"Our general conclusions and findings heretofore made have emphasized the importance and desirability of bringing the several intraterritorial freight-rate structures under consideration closer together in level and more upon the same pattern or scheme. We have also emphasized the importance and desirability of removing as many differences as possible between the interterritorial rates of the respondents and the intraterritorial rates which they maintain. The basis which we shall not outline is in harmony with that objective, and will approach, as a preliminary step, the uniformity of class rate structure which we have previously found will be just, fair, and reasonable.

"We find and determine that the basis hereinafter outlined will result in rates which, until a complete revision in harmony with our previous findings is possible, will be just and reasonable.

"We find and determine that on and after the effective date of the order to be entered herein, the existing and current interstate class rates applicable to freight traffic moving at the classification ratings within southern, southwestern and western trunk-line territories as those territories have heretofore been described in this report, and interterritorially between those terri-

tories, and also between those territories, and official territory, as hereinbefore described, will be unjust and unreasonable unless reduced 10 percent, subject to the class 1 scale shown at the end of this paragraph as minima for class 1 rates, and subject to the qualifications hereinafter indicated. This reduction is to be made by using the present current applicable class 1 rates as a base, and reducing them 10 percent, subject to observance of the rates in the distance scale set out hereinafter as minima. The rates on all the other classes in each class-rate system are to be correspondingly reduced by observing the same percentage relations to the class 1 rates thus reduced that such classes bear to the currently applied class 1 rates. No changes in existing exception rates or column rates are contemplated by this finding. No increase in any existing class rates is to be made under this finding within the southern, southwestern, and western trunk-line territories, and interterritorially between those territories,

and also between those territories and official territory. In determining resulting rates, fractions of a cent should be disposed of by dropping those of less than one-half cent and by increasing those of one-half cent or more to the next whole cent. We do not contemplate that groupings in connection with the present class rates shall be changed as a result of this finding. In applying the scale of minimum rates, the distances between groups or blocks of stations upon which the present class rates are based are to be observed, rather than the actual distances to or from such station, when differing therefrom. (The table of rates included at this point in the report is here omitted).

"We find and determine that simultaneously as a part of the adjustment hereinbefore outlined, the existing applicable interstate class rates for freight traffic moving at classification ratings within official territory (including Illinois territory) should be increased 10 percent as maximum scales, superseding the intraterritorial official class-rate scale heretofore prescribed

or authorized by us, subject to the qualifications hereinafter indicated, and that as so increased those scales will be just and reasonable as maximum. The increase of maximum class rates applicable within official territory is to be made by using the present current applicable class I rates as a base, and increasing them 10 percent. The rates on the other classes should be correspondingly increased by observing the same percentage relations to the maximum class I rates as thus increased that such classes bear to the currently applied class I rates. No changes in existing exception rates or column rates are contemplated by this finding. The same provision with respect to disposition of fractions of a cent, as to groupings, and as to the ascertainment of distance hereinbefore stated with respect to the reductions within and between other territories and between those territories and official territory, shall in like manner apply to the increases in the maximum class-rate charge without additional charge therefor. We also find and determine that such pick up and delivery service has be extended in scope largely since our findings and orde s in the various proceedings hereinbefore recited which prescribed or approved the class rates in issue in this proceeding. We find and determine from the evidence of record in this proceeding, that when such service is performed the applicable class rate with the existing minimum charge as stated does not yield the out-of-pocket costs incident to the transportation service which it purports to cover. We further find that to the extent the minimum charge per shipment is less than 75 cents, it is below a just and reasonable minimum rate and charge. Upon the record as it stands, and predicated upon the adjustments for the interim period hereinbefore found to be just and reasonable, we determine and find that the minimum charge per shipment, whether pick-up and delivery service is afforded or not, whenever such charge is below 75 cents, is below the minimum of a just and reasonable rate and charge and that 75 cents is and will be a just and reasonable minimum charge to be made.

"The foregoing findings and determinations are made as of the date when the order to be entered herein becomes effective. Inasmuch as these proceedings will necessarily be held open upon our docket and as our power to su[illegible]d, modify, or set aside our orders is recognized [illegible] act, we do not now prescribe, a specified period of time during which these findings as to the interim adjustment shall continue in force, but make them as continuing until our further order.

"In certain States the applicable intrastate class rates are held to a basis prescribed by us in orders entered in proceedings under section 13 (3) and (4) of the act. No especial consideration has been given to such intrastate rates in this proceeding. If any modification of our outstanding orders seems necessary, it should be sought by appropriate action as contemplated by our general rules of practice.

"Our outstanding orders will be modified to the extent necessary to enable the carriers which are bound thereby to publish and file schedules embodying such increases and decreases; and authority will be given by appropriate order under section 6 of the act for the publication of simple forms of supplements to existing schedules to effectuate such increases and decreases. If carriers need relief under the provisions of section 4 of the act, we will give prompt consideration to applications therefor."

And order was entered making this ad interim revision effective as of January 1, 1946, but it was suspended pendente lite by order of this Court.

We find that the facts found by the Commission are supported by substantial evidence and adopt them as our findings. Their inclusion herein by reference to the Commission's Report is to be understood.

The Western Lines were allowed at the final hearing in this court, over the objection of the defendant, to introduce some evidence on the question of the confiscatory character of the ad interim order as to them. This was received subject to a motion to strike on which decision was reserved at the close of the hearing. The motion to strike is now

denied on the authority of Baltimore & Ohio R. R. *v.* United States, 298 U. S. 349 and we make the following findings on the evidence thus received.

A very large number of different commodities are carried at one time or another in less-than-carload lots by the so-called Western Lines within the rate territories here involved west of the Mississippi River. Some of this traffic, though what percentage was not definitely shown, moves on exception rates and some on commodity rates but a substantial amount of it is carried on class rates. The average loading per car of this traffic for the year 1939 was 4.3 tons and that is close to what it had been for some six years previously, though on the whole the year 1939 showed a little decline mainly due to competition by carriers by motor truck and to the greater combining of shipments into carload lots. Because of an order of the Office of Defense Transportation issued in 1942 the minimum per car loading of the less-than-carload traffic was set at 10 tons and that more than doubled the previous average loading per car. That order was still in effect at the time of the hearing. When it is rescinded the railroads intend to return to pre-order practices and may have to cut the average loading to move the freight more quickly though that will depend upon the impact of competition and the volume offered for such carriage. There are some items in what is known as Consolidated Freight Classification No. 16, and the supplements thereto, which are rated fourth class, column 55, to which no commodity or exception ratings are applicable in less-than-carload lots. That is also true in respect to some third class ratings, column 70. There is a substantial movement of such commodities in Southwestern Territory and there is no major railroad, other than the so-called Burlington Lines, which relies for its revenues exclusively on its operations within the Western Trunk Line and Southwestern Territories which has not been in some sort of a receivership or bankruptcy proceeding within the last five years. The raising of rates, other than class rates, for less-than-carload lots as suggested by the Commission in its report for consideration by the railroads has not been done since that has not been thought feasible in view of the probable loss of traffic it would cause.

There was evidence indicating that the carriage of the commodities above referred to which are not carried by the railroads within Western Trunk Line and Southwestern Territories other than on class rates in less-than-carload lots will not produce enough revenue to pay the cost of their carriage when the ad interim reduction in class rates becomes effective but we are unable to find that to be a fact proved. The statistical evidence to support that contention was based on the assumption that the average car loadings would be as low as 4.3 tons, which was a low point average, and apparently did not take into account that part of the Commission's order which requires a minimum charge of 75 cents per shipment less-than-carload instead of the 55 cent minimum charge heretofore. We have not sufficient confidence in that type of evidence to be satisfied that it proves that deficit carriage is required by the ad interim order, though we find from the evidence that costs of the carriage have for some time been increasing and will probably show additional increases.

CHASE, Circuit Judge:

The Commission acted, in making the investigations and the resulting orders, pursuant to its conception of its duties as the agency created to administer the Interstate Commerce Act (49 U. S. C. A. Par. 1.), which will hereinafter be called the Act. Its action was taken particularly with reference to Par. 1 (4) which imposes upon every railroad which is a common carrier in interstate commerce the duty

"to provide and furnish transportation upon reasonable request therefor, and to establish * * * just and reasonable rates, fares, charges and classifications applicable thereto; * * *."

And to Par. 1 (5) (a) which provides that:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, * * * or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Also to Par. 3 (1), which, as amended by the Transportation Act of 1940 (49 U. S. C. A. (Supp.) Par. 3 (1), provides that it shall be unlawful:

"For any common carrier • • • to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; • • •."

"That whenever after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly prefential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish,

demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

The inquiries were commenced, the report filed, and the order made as provided in Pars. 13 (2), 14 (1) and 15 (1) of the Act.

In the first of the two suits which were brought the plaintiffs and the intervenors who support them attack the ad interim order on the grounds that it is an attempt to regulate industrial conditions by means of rate making; that it is the result of political agitation; that findings essential to support the order are lacking and that the evidence does not support the findings made, in that there is no proof of facts to support so-called ultimate findings above quoted to keep them from being merely arbitrary and capricious. These so-called preliminary findings which are lacking and of which proof is also lacking are said to be that there is no finding of a threatened rate war which would jeopardize the revenues of the railroads in Official Territory; or that the existing class rates are not fully compensatory to railroads in Official Territory for the transportation services for which they are charged; or that they are so low as to cast an undue burden upon other traffic. Also it is argued that the finding of undue prejudice and preference created as between territories by the present class rates is arbitrary because not based upon preliminary findings made on proof by means of substantial evidence to the effect that the class rates published are the rates at which the freight moves; because findings and proof of a competitive relationship between the party preferred and the party prejudiced are lacking; because findings and proof of substantial injury to the party found to be prejudiced and of substantial benefit to the party found to be preferred are lacking; because findings and proof that the same carrier or carriers are responsible for or control both the preferential and prej-

udicial rates are lacking; because findings and proof that the carriers charge existing class rates on the same kinds of freight moved into Official Territory which is carried at class rates within Official Territory are lacking; because findings and proof that similar freight is carried under similar conditions in each territory are lacking; and perhaps there are other grounds of similar nature. The suit brought by the Western Lines and supported by the intervenors aligned with them adds the ground that the ad interim reduction in the class rates in the West is confiscatory.

The petency of much of the argument in support of the grounds relied on by the plaintiffs depends upon the effect to be given the before mentioned amendment to Par. 3(1) of the Act by the Transportation Act of 1940 and to Par. 5 (b) of the latter. The change thus made in Par. 3(1) of the Act was the addition of the words "region", "district, territory" following "transit point" in the enumeration of the persons, places and traffic as to which preference and prejudice was expressly made unlawful and prohibited. In accordance with what has become a somewhat common practice, the Transportation Act of 1940 contains a declaration of policy which in part is "to encourage the establishment and maintenance of reasonable charges for transportation service without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices." And in Par. 5(b) is found what is known as the Ramspeck Resolution where it is provided that:

"The Interstate Commerce Commission is authorized and directed to institute an investigation into the rates on manufactured products, agricultural commodities, and raw materials, between points in one classification territory, and points in another such territory, and into like rates within any of such territories, maintained by common carriers by rail or water subject to part I of the Interstate Commerce Act, as amended, for the purpose of determining whether said rates are unjust and unreasonable or unlawful in any other respect in and of themselves or in their relation to each other, and to enter such orders

as may be appropriate for the removal of any unlawfulness which may be found to exist: * * *."

The Commission undertook to carry out the mandate of this statute by means of the investigations it had already initiated as above set forth. It found, however, that, because of conditions largely attributable to the war, it was advisable to confine its investigation and orders to classifications and class rates established and maintained by common carriers by rail and accordingly did so.

But it is earnestly argued by the plaintiffs, especially by the Western Lines, that the Commission misinterpreted the above changes in the statute to amount to a mandate requiring it to bring about an equalization and uniformity of rates for like kinds and amounts of commodities mile for mile among the various rate territories of the country and to increase its powers so to do. It is recalled that the Commission had previously mistakenly construed the so-called Hoch-Smith Resolution to give it added powers to correct what it found to be unjust discriminations "as between the various localities and parts of the country." And it is pointed out that if such a mistaken interpretation has been made the order which is the result of it is erroneous and must be set aside. Ann Arbor R. R. *v.* United States, 281 U. S. 658; Atchison, T., & S. F. Ry. *v.* United States, 284 U. S. 248, 262. That the same mistake has been made is thought to be apparent because the words "parts of the country" in the above quotation from the Hock-Smith Resolution are as broad and comprehensive as "regions, districts, territories" added by the 1940 Amendment to Par. 3 (1). Yet even if this premise be true, it does not follow that the same mistake has now been made. It does not appear that the Commission has herein acted upon any assumption that the 1940 changes altered the basic principles governing its action. On the contrary, it appears that in determining the existence of discriminatory rates it has construed the changes in the statute to mean that where it is found that class rates are different in the different territories, and interterritorially, and those differences cannot be justified under recognized principles of rate making by proof of sufficient differences in costs

of transportation, composition and amount of traffic, competition by common carriers other than railroads, and the like, those rates may be found unjustly preferential or prejudicial because unduly discriminatory and consequently unlawful as between regions, districts and territories.

We think this interpretation of Par. 3 (1) of the Act as amended is supported by the legislative history. The original Interstate Commerce Act was primarily aimed at the elimination of unjust discriminations of various kinds. Louisville & Nashville R. R. *v.* United States, 282 U. S. 740, 749-50. Yet it did not until the amendment of Par. 3 (1) in 1940 expressly prohibit unjust discriminations against any region, district or territory as such. "Territory" had become a word of art denoting the several rate territories which had grown up and, by adding region and district, parts of such territories were included to amplify the words "locality, port, port district, gateway, transit point" which had previously been the only designation of what might be called geographical units in the specific reference in the statute to a person, company, firm, corporation, association, * * *, or particular description of traffic" as to which unjust preference and prejudice and discrimination were made unlawful. These words had proved to be, in their effect upon geographical designation as such, of somewhat restricted application as was shown by Texas & Pacific Ry. *v.* United States, 289 U. S. 627.

This amendment to Par. 3(1) appeared in S. 2009. In the report made by the Senate Committee on Interstate Commerce[5] It was said as to Par. 3(1), "There has been no substantial change therein, except that the words 'region, district and territory' appearing in lines 20 and 23 on page 26 have been inserted." And the chairman of the committee said in part in explanation of the amendment, "The previous provision with regard to 'discrimination' simply referred to discrimination as to 'locality, port, port districts, gateway, transit point, without specifying the region, district or territory. So, we felt that by broadening the language we would at least take away that excuse, and we

[5] Report No. 433, 76 Cong. 1st Session at page 11.

would provide expressly that the Commission should not discriminate in its rate structure.'"[6] In the discussion of the bill in the Senate the chairman of the committee in charge of it was asked if he thought the proposed amendment of Par. 3(1) would make toward the equalization of rates in the various regions. And he replied, "I do not think there is any doubt about it at all, because that is the purpose of the bill; it is the intention of the bill."[7] We think Par. 3(1) as thus amended does add new factors to be taken into account by the Commission in determining, under the old and well recognized principles which were before guides to decision in such matters, whether existing rates are unlawful. These new factors are whether such rates are unjustly preferential, prejudicial and discriminatory as between regions, district or territories; and, in our opinion, Par. 3(1) now empowers the Commission to find such rates unlawful even though they would have been lawful in the light of all relevant considerations before the amendment. We may, indeed, take it for granted that they were lawful previous to the amendment since they had been in the main the result of comparatively recent investigations and orders of the Commission. That the Commission correctly interpreted its powers and duties after the amendment appears to be shown by the following quotation from its report: "By the amendment to the substantive antidiscrimination provisions of section 3(1) all discriminations in the form of undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, as between regions, districts or territories, viewed as separate entities, were brought directly within the purview of the act along with all the other inhibitions previously included. We were then authorized and directed by the other provisions mentioned to remove any such discriminations found to exist in a proper proceeding. This means that such discriminations as those mentioned which result from differences in the methods of distributing the general rate burden in the several rate-making territories, or from any other cause, if

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[6] Cong. Rec. Vol. 84, Part 6, p. 5889, 76th Cong., 1st Sess.
[7] Cong. Rec., Vol. 84, Part 6, p. 6072.

not justified upon proper consideration of recognized elements of rate making applied in the light of the amended law are unlawful and should be corrected."

We, therefore, hold that the Commission correctly decided that the ad interim order under review was within the scope of its statutory power and proceed to determine whether the order was erroneous in any respect on the other grounds advanced for setting it aside.

First, there should be a brief allusion to the contention that the plaintiff States have no standing to sue as parens patriae but only as shippers and receivers of freight. This point has become more or less academic since there are states who are parties plaintiff who plainly may sue as freight shippers and consignees directly affected by the order. But all the States who are parties are political entities which are also regions or districts within the rate-making territories involved and they are directly affected as such and have an interest in behalf of their citizens and communities above and apart from the rights of any particular shipper or receiver of freight to a continuance of existing rates or the maintenance of others. This we think distinguishes such cases as Oklahoma v. Atchison, T. & S. F. Ry., 220 U. S. 277, 286; Sprunt & Son, Inc. *v.* United States, 281 U. S. 249; and Alabama Power Co. *v.* Ickes, 302 U. S. 464, and gives these States standing to sue as parens patriae to preserve or enhance the welfare of their citizens by securing to them the proper administration of federal laws under the principles applied in Georgia *v.* Pennsylvania R. R., 324 U. S. 439, 446-52.

Our review of orders made by the Commission within the scope of its authority is limited to the following broad considerations and matters incidental thereto: (1) Whether the order is based upon adequate findings; (2) Whether there is substantial evidence in the record to support the findings made; and, (3) Whether the record was made as the result of adequate hearings of which due notice was given to all interested parties and at which those who appeared were fairly permitted to present their evidence and be heard in argument. Board of Trade *v.* United States, 314 U. S. 534; Rochester Telephone Corp. *v.* United States, 307 U. S. 125, 140; Atchison, T. & S. F. Ry. *v.* United States,

284 U. S. 248; Merchants Warehouse Co. *v.* United States, 283 U. S. 501.

We may dispose of the last of these quickly. It is apparent that the Commission did give due notice to all interested parties; that it did conduct numerous and lengthy hearings in various parts of the country involved; and that it did admit into the record and give proper consideration to, after giving a fair opportunity for argument, such relevant evidence as was offered.

In considering the second we are limited to a search for substantial evidence to support such findings as were made. There is such evidence. While it is not uncontradicted, the over-all weight of the evidence cannot be determined by us but is for the sole consideration of the Commission. Questions pertaining to the effect of rates and to rate making are extremely involved and highly technical matters and have to be decided after evaluating intricate evidence which is often based in part upon assumptions. Persons unskilled in those matters are much handicapped in dealing with such subjects and the well established rule is that the expert knowledge of the Commission and its experience, when resorted to and given effect in sufficiently supported findings which are the result of adequate and properly conducted proceedings, should be left undisturbed by the courts under the doctrine of administrative finality. Rochester Telephone Corp. *v.* United States, supra; Interstate Commerce Commission *v.* Illinois C. R. R., 215 U. S. 452; Chicago, St. P., M. & O. Ry. *v.* United States, 322 U. S. 1; Gregg Cartage & S. Co. *v.* United States, 316 U. S. 74.

In considering the first, we must decide whether the so-called primary findings and proof to support them are indispensable to establish the kind of unlawfulness here found by the Commission in the light of the above-mentioned amendment of the Act.

Such primary findings need not be listed again. We now refer to them as set forth in the above statement. They relate in one way or another to what have been held essential to be proved to establish a basis for findings of preference, or prejudice or discrimination as to rates before the amendment of 1940 to Par. 3 (1) of the Act. They are

matters which are still pertinent and if evidence to support findings to supply the lack pointed out as to this record had, or could have been, offered it would undoubtedly have been admissible and findings in accord with it would have given added support to the order made. But is is quite another thing to say that all such findings are needed to support the so-called ultimate findings made and the ad interim order based on them. For instance, it has been argued that there can be no increase in class rates in Official Territory unless there is first a so-called primary finding, supported by substantial evidence that the present rates are not compensatory. While that fact, if proved, would have been of much significance the failure to prove it and the consequent lack of a finding that present rates are confiscatory does not leave the Commission's finding that the rates are unlawful unsupported by substantial evidence. It weighed all the evidence and found that it tipped the scales in favor of its ultimate finding that the present rates were unlawful. That basic conclusion if supported sufficiently by other evidence, was enough to justify the exercise of the Commission's statutory power to alter the rates as needed to make them lawful for the future. Pennsylvania R. Co. *v.* United States, 323 U. S. 588; Chicago, B. & Q. R. R. *v.* United States, 60 F. Supp. 580; Scandrett *v.* United States, 32 F. Supp. 995, aff'd 312 U. S. 661; Jefferson Island Salt Mining Co. *v.* United States, 6 F. (2) 315. We think enough was proved and found to warrant such basic conclusion. There was ample evidence on which the Commission found that the class rates in the various territories involved and the interterritorial class rates among those territories were on different levels within the existing classification as well as based upon differing classifications. The Commission found on substantial evidence many so-called primary facts, which need not be enumerated here but which appear in its report, showing transportation costs, composition of traffic, kinds of markets, natural resources, commodities produced or manufactured in the various territories and the parts thereof, and found preference, prejudice, and discrimination as above set forth. Having found the basic facts as pointed out, the Commission was under the duty to exercise its judgment and dis-

cretion in determining their effect upon the territories. We may not agree with its decision and we may not agree with the wisdom of the ad interim order but we have no power to set the order aside because of any such disagreement and substitute our own judgment for that of the Commission. Norfolk & Western Ry. *v.* United States, 287 U. S. 134. For instance, it would be unlawful because discriminatory to try to equalize clearly inherently unequal business conditions, not due to existing freight rates in the various territories or any regions or districts therein, by manipulating rates. Anchor Coal Co. v. United States, 25 F. (2d) 462. We might think that the probable import of this order, but we are bound by the Commission's action in justifiably finding facts to give another, and a lawful, basis for it. Again it is well known that there is a zone of reasonableness between the maxima and minima in rate making in which a carrier may usually set the rates it charges. United States *v.* Chicago, M., St. P. & P. R. R., 294 U. S. 499. We might think these existing class rates are within such a zone, but again we may not interfere with the order for that reason. Nor can other like considerations prevail to brush aside the statutory control over rates which has been confided to the Commission.

It has been earnestly argued that the investigations and order under review are the result of political agitation having for its ultimate object the dislocation of industry from Official territory and its establishment in the other territories, principally in the Southern, and that does appear plausible. Yet such a question is not within the bounds of judicial cognizance but relates to matters of legislative policy. Whether such policy is wise or the opposite is not for us to determine. We can only be concerned with decision as to whether or not the Commission's action was within its power properly exercised under statutory authority which does not go beyond Constitutional limitations. Chicago, B. & Q. R. R. *v.* McGuire, 219 U. S. 549; Rochester Telephone Corp. *v.* United States, supra.

The contention that the order should be set aside as to the Western Lines because confiscatory as to them raises a question of Constitutional limitation under the Fifth Amendment upon the statutory authority which can be

conferred upon the Commission. The railroads in Southern territory make no such contention and it would seem that the Western Lines came somewhat late to rely upon any violation of Constitutional safeguards as to them.

From the cost studies relied upon by the Commission after it decided what weight should be given them, the Commission found that what is called less-than-carload traffic is not, when war-time loading is excluded, "yielding, on the average, its out-of-pocket costs plus constant expenses solely related to this traffic, plus the cost of collection and delivery, in any territory except possibly in the southern where the margin of difference between revenues and these expenses is slight." It is, therefore, argued that the confiscatory nature of the ordered reduction in class rates moving in less-than-carload lots is self-evident and that as it does not produce its out-of-pocket costs no trial period is necessary to determine the unlawfulness of the order since an increase in traffic brought about by the lowered rates would obviously but increase the out-of-pocket costs and increase the deficit.

It will be remembered that the Western Lines carry only .6 of one per cent of their total freight at rates affected by this order. We don't suggest that even that is less than enough to entitle them to relief if they can show that they will be compelled to carry it in the future for less than actual cost. But this less-than-carload traffic to which the cost studies relate is not by any means wholly carried on class rates and in its supplemental report of October 30, 1945, the Commission correctly said:

"The cost data on less-than-carload traffic relates to such traffic as a whole and not solely to that which moves on class rates. In appraising the figures it must be borne in mind that much of this traffic does not move on class rates, but on exception and commodity rates. Obviously, the class-rate traffic bears the highest rates. Consequently, even if under present condition less-than-carload traffic, as a whole, in the West and South is not paying its proper share of the costs, it is possible that such a result is due in large measure to the maintenance of exception and commodity rates. In any event, data based only on averages for all

this traffic do not necessarily demonstrate the impropriety of reductions in the highest level of rates. Even as to class rates on less-than-carload traffic, the record shows that in western trunk-line and southwestern territories many intrastate class rates are maintained which are lower than the corresponding reduced interstate class rates required by our interim order."

The attempt in this court by the Western Lines to break down less-than-carload lot carriage into parts carried wholly on class rates and parts as to which the above finding of the Commission is correct, and to show that the part carried wholly on class rates would not pay its way under the ad interim order has failed in our judgment to measure up to the required standard of certainty by way of proof as to transportation costs for particular commodities. Compare, Baltimore & Ohio R. R. *v.* United States, supra. There is too much assumption and opinion involved in such evidence to justify definite findings, in advance of a trial period, to the effect that the ad interim rates will be confiscatory. See St. Joseph Stock Yards Co. *v.* United States, 298 U. S. 38; Minnesota Rate Cases, 230 U. S. 352; Wilcox *v.* Consolidated Gas Co., 212 U. S. 19; City of Knoxville *v.* Knoxville Water Co., 212 U. S. 1.

Nor is the order erroneous because the carriers were not allowed any alternative method for the removal of the discriminations which make the present class rates unlawful. This was a rate order made under Par. 15 and not an order under Par. 3 in which an alternative must be provided as held in Texas & Pacific Ry. *v.* United States, supra.

The denial by the Commission of the application to reopen the proceedings and receive additional evidence especially as to conditions subsequent to 1939 was not an abuse of its discretion. It is inevitable in such matters that an order by the Commission cannot be based on strictly up-to-the-minute proof. There must be unusual circumstances, not here present, to justify the reversal of an order such as this on the ground that it was based on a stale record. Interstate Commerce Commission *v.* City of Jersey City, 322 U. S. 503. But see, Atchison T. & S. F. Ry.

v. United States, 284 U. S. 248 as limited by United States *v.* Northern Pacific Ry., 288 U. S. 490.

A decree will be entered dismissing the petitions in each case but the dismissal of the petition by the Western Lines will be without prejudice to another suit to restrain the enforcement of the ad interim rates if they are found, after a fair test, to be confiscatory. See Darnell *v.* Edwards, 244 U. S. 564.

If any of the parties desire findings of fact in addition to those made, proposed findings may be submitted to the court within fifteen days.

May 9, 1946.

HARRIE B. CHASE,
U. S. Circuit Judge.
JNO. C. KNOX,
U. S. District Judge.
STEPHEN W. BRENNAN,
U. S. District Judge.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Civil No. 2311

THE STATES OF NEW YORK, DELAWARE, INDIANA, MARYLAND, MICHIGAN, NEW JERSEY, OHIO, WISCONSIN, AND THE COMMONWEALTH OF PENNSYLVANIA,

Plaintiffs,

against

THE UNITED STATES OF AMERICA,

Defendant

Interlocutory Injunction

The States of New York, Delaware, Indiana, Maryland, Michigan, New Jersey, Ohio, Wisconsin and the Commonwealth of Pennsylvania, having filed their verified petition in this Court praying a permanent injunction forever annulling and enjoining enforcement of certain orders of the Interstate Commerce Commission in a proceeding before it entitled Class Rate Investigation, 1939, Docket No. 28300, and praying also an interlocutory injunction enjoining the enforcement of said order pending final determination of its petition; and service of said petition having been made as required by law upon the Attorney General of the United States and the Interstate Commerce Commission; and the Interstate Commerce Commission having intervened as a defendant herein; and the Governors of the New England States and various Western railroads having intervened in this proceeding as additional parties plaintiff; the States of Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Kansas, Oklahoma, Arkansas, Texas, Nebraska, North Dakota and South Dakota, and other parties having intervened as defendants; and the Honorable Harrie B. Chase, Circuit Judge, and the Honorable John C. Knox,

District Judge, having been called to the aid of Honorable Stephen W. Brennan, Judge of this District, as required by Title 28, U. S. Code, Section 47; and an order to show cause having issued and been served upon the Attorney General of the United States and the Interstate Commerce Commission requiring them to show cause before this Court so constituted at a hearing to be held in Room 110, United States Court House in the City of New York, N. Y., on December 13, 1945, at 2:00 P.M., why the interlocutory injunction prayed for by plaintiffs should not issue; and at least five days' notice of said hearing having been given as required by law; and said hearing having been had, the Court sitting in New York City for the convenience of and with the consent and by stipulation of all parties; and plaintiffs and intervening plaintiffs having been heard by counsel and having filed various affidavits with the Court; and the United States having been heard by its Assistant Attorney General, and having filed affiadvits with the Court, the Interstate Commerce Commission by its Chief Counsel, and other interveners by their respective counsel; and the Court having considered the verified petition and the affidavits presented to it and the arguments of counsel, the undersigned as such Court now make the following findings of fact and conclusions of law:

Findings of Fact

1. This is a suit brought under the provisions of Title 28, U. S. Code, Sections 41 and 43 to 48 inclusive, seeking an injunction annulling and enjoining orders of the Interstate Commerce Commission in a proceeding entitled *Class Rate Investigation, 1939*, Docket Nos. 28300 and 28310 on the Commission's docket.

2. Plaintiffs are sovereign states and bring this action both as shippers and receivers of freight, on which rates affected by the Commission's orders are charged, and also in their sovereign capacities on behalf of their citizens and communities because of the effect of the Commission's orders upon the states, their citizens and communities.

3. The orders of the Interstate Commerce Commission sought to be enjoined would require, effective January 1,

1946, an increase of ten per cent in the class rates charged by the railroads for the transportation of class rate freight within Official Territory and a reduction of ten per cent in the class rates charged by the railroads for the transportation of such freight as moves under class rates within Southern, Southwestern and Western territories and between the several territories.

4. The class rates are charged by the railroads in Official Classification Territory for the transportation by them of a large variety of manufactured articles, products of industry and agricultural products. The report of the Interstate Commerce Commission dated May 15, 1945, indicates that 5.8 per cent of all carload freight transported in Official Territory moves at class rates. A ten per cent increase in these class rates would impose upon industry, shippers and receivers of freight transported within Official Territory an increased freight cost of many million dollars a year.

5. The ten per cent increase if required and permitted to be charged by the railroads for transportation within Official Classification Territory pending final determination of this suit would subject industries, shippers and receivers of freight, and the citizens and communities of the states in Official Territory to great injury, for which they will have no redress in the event the Commission's orders should finally be held invalid and permanently enjoined, in that the increased charges on shipments at class rates will increase the cost to industries of shipping and receiving their products, will increase the cost of products to consumers, will discourage production and conversion to peacetime operation, and will tend to cause unemployment and consequent local distress.

6. The present class rates in Official Territory which would be continued in effect if an interlocutory injunction should issue suspending the effect of the Commission's orders were prescribed by the Interstate Commerce Commission in 1930, and there has been no complaint in the proceedings before the Commission against these rates and no demand by any shipper, receiver, community or state that these rates be increased.

7. The injury which would be suffered by the industries, shippers, receivers, communities and citizens in Official Territory would greatly exceed any injury to shippers and communities or states in other sections of the country from withholding the reductions in rates ordered by the Commission, pending final determination herein, for the reason that a much greater volume of freight is transported by the railroads within official Territory upon which the class rates are charged, which would be increased ten per cent, than the volume of freight upon which the Commission's orders would require a reduction in the freight rates. The Commission found that the class rates are charged on 5.8 per cent of the carload freight transported within Official Territory, on only 1.8 per cent of the carload freight transported in Southern Territory, .6 per cent of the freight transported in Western Trunk Line Territory, .9 per cent of the freight transported from Southern to Official Territory, and 3.1 per cent of the freight transported from Western Trunk Line to Official Territory. In addition to this, the higher percentage in Official Territory is to be applied to a much greater volume of freight. The Commission found that in a period of two days the carload freight transported within Official Territory aggregated 111,914 carloads, while the carload movement within Southern Territory was only 23,512 carloads, and within Western Trunk Line Territory was only 32,889 carloads. The movement from Southern to Official Territory amounted to only 15,989 carloads and from Western Trunk Line to Official Territory to 12,120 carloads. Computations contained in affidavits presented to the Court indicate that the ten per cent increase in the class rates for transportation within Official Territory of both carload and less-carload freight would cause an increase in freight charges to shippers and receivers of freight in that territory of over $15,000,000 annually, as compared with reductions in the charges for shippers in Southern Territory of not more than one-tenth of this figure.

8. Greater disturbance and confusion would result if the changed rates ordered by the Commission should be per-

mitted to go into effect and the Commission's orders should thereafter be held to be invalid and enjoined.

9. The reduced rates ordered by the Commission with respect to freight transported by the Western railroads would cause a very substantial reduction in their revenues, which they would have no means of recouping, if the Commission's orders should finally be held to be invalid and permanently enjoined.

10. The present class rates in all territories were prescribed by orders of the Commission in various proceedings as maximum reasonable rates and these orders would be operative to maintain the present rates in effect if the orders attacked in this suit should be suspended.

11. Although tariff schedules have already been filed with the Commission by the railroads providing rates to become effective January 1, 1946, in conformity with the Commission's orders sought to be enjoined, the Official Classification railroads and the Western railroads by their counsel have advised the Court that such tariff schedules have been filed only under compulsion of the Commission's orders and that if such compulsion is removed by the suspension and enjoining of said orders, they will take appropriate steps to continue in effect their present class rates.

Conclusions of Law

1. Plaintiffs have capacity to maintain this suit both as shippers and receivers of freight, the rates on which would be affected by the Commission's orders sought to be enjoined. The question as to whether plaintiffs in their sovereign capacities are otherwise proper parties hereto is not now decided.

2. The fact that the railroads under compulsion of the orders have already filed tariff schedules providing rates in conformity therewith, to take effect on January 1, 1946, does not render this suit moot or deprive this Court of power to grant effective relief by interlocutory injunction.

3. There are reasonable grounds for believing that the reports and orders of the Commission may be erroneous, contrary to and without adequate support in the evidence, and should be permanently annulled and their enforcement enjoined. This cannot, however, be determined until final hearing herein and upon examination of the evidence before the Commission which will then be before the Court.

4. There is greater justification for continuing in effect temporarily the present class rates which the Commission has prescribed and under which business has been done for a number of years than for permitting a sudden change in rates required by new orders, the validity of which is open to question.

5. Considering the doubt as to the validity of the Commission's reports and orders, and balancing the conveniences and equities of the situation, the Court in its discretion should issue an interlocutory injunction enjoining and suspending the enforcement of the Commission's orders pending final determination herein.

Wherefore, good cause appearing therefor, it is Ordered, Adjudged and Decreed that an interlocutory injunction be and it is hereby granted enjoining and suspending until further order of this Court the order of the Interstate Commerce Commission dated May 15, 1945, as amended, and its order dated October 30, 1945, in its Docket Nos. 28300 and 28310; and until further order of this Court, said orders of the Interstate Commerce Commission are hereby enjoined and suspended and shall have no force or effect.

And It Is Further Ordered that the United States and the Interstate Commerce Commission and their several officials, agents, servants and attorneys be and they are hereby enjoined from taking any action to enforce compliance with said orders of the Interstate Commerce Commission or prosecuting any alleged violation thereof pending further order of this Court.

Let plaintiffs file a stipulation for costs in the sum of $5000.

HARRIE B. CHASE,
U. S. C. J.;
JOHN C. KNOX,
U. S. D. J.;
STEPHEN W. BRENNAN,
U. S. D. J.

Dated: December 20, 1945.

Original filed, Dec. 21, 1945; 5:05 P.M., Clerk's Office at Utica, N. Y.

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION No. 2311

THE STATES OF NEW YORK, DELAWARE, INDIANA, MARYLAND, MICHIGAN, NEW JERSEY, OHIO, WISCONSIN and THE COMMONWEALTH OF PENNSYLVANIA,

Plaintiffs,

against

THE UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION No. 2337

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, ET AL.,

Plaintiffs,

against

THE UNITED STATES OF AMERICA,

Defendant.

Final Decree and Order Continuing Interlocutory Injunction

This cause coming on to be heard before the undersigned sitting as a specially constituted court of three judges

pursuant to the Urgent Deficiencies Act, 28 U. S. C., Sections 41, 43-48, and full hearing having been had, the pleadings and evidence having been considered and the parties having been heard by counsel in argument and the cause having been submitted for final decree, and this Court having been fully advised in the premises and having filed its opinion, findings of fact and conclusions of law, it is

Ordered, adjudged and decreed:

(1) The petitions of the plaintiffs herein be and they are hereby dismissed.

(2) Dismissal of the petition filed by the plaintiff railroads in Civil Action No. 2337 is without prejudice to another suit to restrain enforcement of the ad interim rates prescribed in the Commission's orders if those rates are found to be confiscatory after a fair test.

And the parties having further been heard upon petition and motions of the plaintiffs and of certain intervenors for continuance of the interlocutory injunction granted by this Court on December 20, 1945 pending the perfecting and final determination of appeals to the United States Supreme Court and the motion of defendants that said interlocutory injunction be dissolved, the Court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. The Court hereby reaffirms and adopts the findings of fact made by it in the order entered herein on December 20, 1945, granting the said interlocutory injunction, as fully as if the said findings of fact were restated herein.

2. If the said interlocutory injunction is not continued pending the perfecting and final determination of the appeals from the final order of the Court herein, the carriers in Official Territory, contrary to their wishes expressed in this Court and solely by reason of the compulsion of the Commission's orders, will be required to file and make effective tariff schedules increasing by ten per cent their class rates charged by them for the transportation of class

rate freight between points in Official Territory, including points in plaintiff States, and the Western Lines will be required to file and make effective tariff schedules reducing by ten per cent their class rates charged by them for the transportation of class rate freight between points in Western Trunk Line Territory and in Southwestern Territory, and to join with the carriers in Official Territory and Southern Territory in reducing by ten per cent their class rates charged by them for the transportation of interterritorial class rate freight.

3. The relative levels of the class rates in the several rate territories affected by the orders of the Interstate Commerce Commission in this proceeding were established by orders of the Interstate Commerce Commission and have been in effect for many years. If the said interlocutory injunction is not continued pending the perfecting and final determination of the appeals from the final order of this Court, the long established class rate relationships among the rate territories would be materially changed, and if the final order of this Court is thereafter reversed by the United States Supreme Court, the disturbance and disruption of business throughout the country would be of serious proportions. Such disruption would cause more hardship to business and to the shippers, receivers, and carriers of freight, than would be caused by the continuance of the long established rate relationships pending the final determination of the appeal from the final order of this Court herein.

4. The Commission's orders, if presently enforced with respect to class rates charged on freight transported by the Western Lines, would cause a very substantial reduction in the revenues of the railroads, which they would have no means of recouping if the Commission's orders should finally be held to be invalid and permanently enjoined.

5. Great and irreparable injury would be done to plaintiffs, their citizens and communities and to the Western Line, if on appeal the orders of the Interstate Commerce Commission are held invalid and if pending appeal their enforcement shall not have been stayed and enjoined and

such injury appears greater than any injury which defendants or intervening defendants might suffer if the Commission's orders are stayed pending appeal and should finally be held valid.

Conclusions of Law

1. The decision of these consolidated causes necessarily involves the determination of novel questions of law of great importance to the shippers, the carriers, and the public of this country. There are reasonable and serious doubts as to the determination of these novel and important questions.

2. Considering the reasonable doubts as to the validity of the orders of the Interstate Commerce Commission herein, the novel character of the questions of law to be determined, the fact that the present class rates were established by the Interstate Commerce Commission itself and have been in effect for many years, and considering the equities of the shippers, the carriers, and the public, the Court in its discretion should continue the interlocutory injunction pending the perfecting and final determination of any and all appeals from the final order of the Court herein.

And, all facts considered, the Court being of opinion and finding that the enforcement of the Commission's orders should be stayed pending appeal from the decision of this Court, now, therefore, it is

Ordered, adjudged and decreed that the motion of the United States and the Interstate Commerce Commission to dissolve the interlocutory injunction granted by the decree of this Court dated December 20, 1945, be and it is hereby denied and that the said interlocutory injunction be and it hereby is continued for a period of sixty days from the date hereof, and if during said period plaintiffs or any of them perfect an appeal to the Supreme Court of the United States, said interlocutory injunction be further continued pending such appeal and until final determination on appeal and order pursuant thereto unless and until otherwise ordered by this Court or by the Supreme Court of the United States. If before the expiration of sixty days from

the date hereof no appeal shall have been taken and perfected from the final decree and order of this Court dismissing the petitions, the interlocutory injunction shall thereupon be dissolved and shall thereafter be of no effect.

Approved as to form only

Edward H. Miller, Special Asst. to the Atty, Gen.
J. V. Norman, Byron M. Gray, H. Emerson Kokjer.

HARRIE B. CHASE,
U. S. C. J.

JNO. C. KNOX,
U. S. D. J.

STEPHEN W. BRENNAN,
U. S. D. J.

Dated: May 24, 1946.

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